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No. 77-1747

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LAND FOR PEOPLE, INC., PETITIONER

v.

CECIL D. ANDRUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINION AND ORDERS BELOW

The order of the court of appeals (Pet. App. 16) directing that the case be dismissed as moot is unreported. The order of the district court granting the plaintiff's Motion for Preliminary Injunction (Pet. App. 18-19) and its subsequent order dismissing the case as moot (Pet. App. 17) are also unreported. The memorandum opinion of the district court (not reproduced in the petition) is reported at 417 F. Supp. 449.

JURISDICTION

The order of the court of appeals (Pet. App. 16) directing that the case be dismissed as moot was entered on January 20, 1978. On April 13, 1978, the Chief Justice extended the time within which to file a petition for a writ of certiorari to May 20, 1978. The petition was filed on May 18, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals abused its discretion by ordering the dismissal, for reasons of mootness, of this action seeking an order requiring the Secretary of the Interior to institute public rule making proceedings and directing him to promulgate rules and regulations concerning sales of "excess lands" under the reclamation laws.

STATEMENT

Petitioner seeks review of an order of the court of appeals directing that its action be dismissed as moot. The factual and legal setting of the case may be summarized as follows.

1. The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. 391 *et seq.*, established a federal reclamation fund to be used for the construction and maintenance of irrigation works. Section 5 of the Act, 43 U.S.C. 431, established certain limitations on sales of water from federal reclamation projects. Specifically, Section 5 prohibited the sale of any right to the use of water to a private landowner with respect to any lands held by him in excess of 160 acres and further provided that no such sale shall be made to any landowner "unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land * * *."

Section 5 of the Reclamation Act was subsequently supplemented by Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 43 U.S.C. 423e. Section 46 states, in substance, that all contracts for the sale of federal reclamation water to local irrigation districts must provide that all landowners receiving federal water and holding in excess of 160 irrigable acres

shall agree to convey their "excess lands" under terms and conditions satisfactory to the Secretary. The sale price of such "excess lands" shall be fixed at an appraised value ascertained "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works."

The Westlands Water District, a unit encompassing approximately 570,000 acres in the San Joaquin Valley of California, receives federal water subject to the requirements of the Reclamation Act and Section 46 of the Omnibus Adjustment Act. Many Westlands landowners owning more than 160 irrigable acres have entered into contracts with the Secretary by which, in return for receiving federal water, they have agreed to convey their "excess lands" within a fixed period (generally 10 years) at a price approved by the Secretary. The contracts also provide that the Secretary shall determine whether a prospective purchaser meets the eligibility requirements of the reclamation laws. Should a landowner fail to convey the "excess lands" within the required period, the lands will be conveyed by the Secretary under power of attorney.

2. The petitioner, National Land for People, Inc. ("National Land") commenced this action against the Secretary and the Commissioner of the Bureau of Reclamation on May 25, 1976. National Land alleged, among other things, that the Secretary, without complying with the public rule making requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553, had formulated a body of rules and regulations for the purpose of determining whether a proposed "excess land" transaction was in compliance with the eligibility requirements of the reclamation laws. National Land moved for a preliminary injunction requiring the

Secretary to initiate public rule making proceedings and restraining him from approving any "excess land" sales in the Westlands Water District until after the final rules and regulations were published.

The federal defendants answered and contended, among other things, that the public rule making requirements of the APA were inapplicable. Thirteen persons and organizations having various interests in "excess land" sales in the Westlands Water District were given leave to intervene as parties defendant.

The district court, on August 13, 1976, entered an injunction directing the Secretary to initiate public rule making proceedings in compliance with the APA. The injunction also restrained the Secretary from approving any contracts or other proposals for sales of "excess lands" in the Westlands Water District until after completion of public rule making.

The federal defendants and the intervenor-defendants each appealed the injunctive order. However, on August 11, 1977, the federal defendants moved the court of appeals that their appeal be dismissed. A few days later, on August 25, 1977, the Secretary published proposed rules and regulations in the Federal Register. 42 Fed. Reg. 43044-43049.

On September 9, 1977, the court of appeals directed the Secretary to advise it concerning further handling of the appeals. After the parties had filed their responses, the court of appeals entered another order which directed the parties to show cause why the order of the district court should not be vacated as moot. Subsequently, on January 20, 1978, the court of appeals entered an order which dismissed the appeals as moot, vacated the order

of the district court, and remanded the cases to the district court with directions to dismiss as moot. This petition followed.

ARGUMENT

The decision of the court of appeals is correct and presents no issue of general importance warranting review in this Court.

1. The exercise of judicial power under Article III of the Constitution is dependent upon the existence of a case or controversy. *Preiser* v. *Newkirk*, 422 U.S. 395, 401; *North Carolina* v. *Rice*, 404 U.S. 244, 246. The "case or controversy" requirement persists throughout the entire course of litigation, including appeals; as this Court stated in *Steffel* v. *Thompson*, 415 U.S. 452, 459 n. 10: "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Thus, a formerly viable suit may be dismissed at any stage of the litigation if intervening events have rendered it moot.

An action seeking declaratory and injunctive relief will be dismissed as moot if the defendant ceases to persist in the challenged conduct and, in addition, satisfies the court that there is no reasonable expectation that the alleged wrong will be repeated in the future. *Preiser* v. *Newkirk*, 422 U.S. 395, 404; *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406. In determining whether a case should be dismissed upon the defendant's representations that it has permanently terminated its former conduct, a court will consider all relevant factors. The decision concerning dismissal lies in the discretion of the court and will be reversed on appeal only if an abuse of discretion is

demonstrated. As this Court stated in *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633:

> * * * the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

2. The circumstances of this case demonstrate that the court below did not abuse its discretion by ordering this action to be dismissed as moot. The petitioner commenced this action in order to obtain a declaration that the Secretary is required by law to promulgate regulations in accordance with the public rule making requirements of the APA and to secure an injunction directing him to comply with these requirements. After the district court entered its injunction, the Secretary moved the court of appeals that his appeal be dismissed. Subsequently, on August 25, 1977, the Secretary published proposed rules and regulations in the Federal Rgister. 42 Fed. Reg. 43044-43049. In addition, the Secretary has conducted public hearings on the proposed rules, has suspended approvals of all "excess land" sales pending promulgation of the final regulations (although the injunction applied only to sales within the Westlands Water District), and is now preparing an environmental impact statement concerning the proposed rules. Upon inquiry from the court of appeals, the Secretary advised that he intends to publish final rules and regulations regardless of the outcome of this litigation and that he will defer approvals

of "excess land" sales until after the final regulations are published.[1]

In short, the Secretary has represented that he will voluntarily grant the petitioners all the relief which they are seeking in this action regardless of the ultimate resolution of this action and his actions have been entirely consistent with his representations. The petitioners assert (Pet. 11-12) that the Secretary might change his position and decline to publish the final rules; however, this assertion is based solely upon speculative contingencies analogous to those rejected by this Court on prior occasions. *Preiser* v. *Newkirk*, 422 U.S. 395, 403; *Hall* v. *Beals*, 396 U.S. 45, 49. Petitioners have fallen far short of demonstrating that the court of appeals abused its discretion by directing that this action be dismissed as moot.

The decision of the court of appeals is not in conflict with any decisions of this Court or the other courts of appeals and presents no question of general importance warranting review by this Court.

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[1]The Secretary also advised the court of appeals that he did not object to the court holding the appeals in abeyance until after the final regulations are published. While we believe the court of appeals' disposition of the case was entirely proper, the Secretary still has no objection to holding the appeals in abeyance until after the final regulations are published. Should this Court determine to grant the petition for a writ of certiorari, the appropriate course might be to enter an Order directing the court of appeals to hold the appeals in abeyance pending publication of the final regulations, rather than setting the case for briefing and oral argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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